

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER GENE TIBBS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2003

No. 238438

Kent Circuit Court

LC No. 01-005808-FH

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of carjacking, MCL 750.529a, for which he was sentenced to eight to twenty years in prison. We affirm.

Defendant first contends that the court erred in admitting other acts evidence under MRE 404(b)(1) because the evidence was only offered to impugn defendant's character and the prosecutor failed to give the requisite notice as required under MRE 404(b)(2). The trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Defendant never objected to the testimony at trial and thus has failed to preserve the issue for appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The alleged character evidence to which defendant takes exception was not admitted under MRE 404(b)(1) to prove that he did in fact commit the carjacking and thus notice was not required under MRE 404(b)(2).

Much of the evidence was properly admitted. Victim Oliver's reference to another case was part of defendant's own statement and was admissible under MRE 801(d)(2)(A). Oliver's allegation regarding physical abuse in a petition for a personal protection order was admissible because the document was admitted without objection and defendant does not contend that the document was improperly admitted. The fact that defendant cheated on his taxes was probative of his character for truthfulness and he could be questioned about it on cross-examination. MRE 608(b).

Oliver's reference to something defendant did to her daughter was volunteered information that was unresponsive to the question asked. An unresponsive answer to a proper question is not usually error, *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975) (citations omitted), and does not provide a basis for relief absent some evidence that the prosecutor conspired with or encouraged the witness to give the testimony at issue. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Defendant has not alleged or shown that such was the case here.

Evidence that defendant was intoxicated or may have used drugs was irrelevant. MRE 401. However, defendant denied using drugs and evidence of his being intoxicated was never mentioned again. Given the fact that defendant freely admitted that he took Oliver's car, whether he was intoxicated or used drugs had no bearing on the only issue for the jury to decide, that being whether he accomplished the taking by the use of force or violence or putting in fear, MCL 750.529a. Thus, defendant has not shown that the error was outcome determinative.

Defendant next contends that the court erred in admitting hearsay testimony. The trial court's ruling is reviewed for an abuse of discretion. *Hine, supra*.

First, defendant contends that the court erred in allowing witness Norris to testify to statements made by Oliver immediately after the event pursuant to MRE 803(2). Defendant concedes that Oliver was distraught when she made the statement. We further conclude that the statement related to a startling event, even if it did not exclusively describe the event. Thus, the statement was admissible under MRE 803(2). See *Berryman v. Kmart Corp*, 193 Mich App 88, 100-101; 483 NW2d 642 (1992). Assuming, arguendo, that the evidence was inadmissible, we find no basis for reversal. The evidence was cumulative to Oliver's and defendant's own testimony and was not particularly prejudicial to defendant in that it did not implicate him in the commission of a crime or tend to prove any element of the crime charged. Therefore, the evidence was undoubtedly harmless, *People v Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998), and could not have affected the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Second, defendant contends that the prosecutor improperly referred to a third person's hearsay statement in questioning defendant. Defendant has not shown that this unpreserved issue involves plain error. *Carines, supra*. It appears that the prosecutor was attempting to impeach defendant with a prior inconsistent statement under MRE 613(a). Moreover, the statement at issue did not tend to prove that defendant used force or violence or putting in fear to accomplish the taking of Oliver's car, and defendant's credibility had been compromised by other admissible evidence. Thus the statement was unlikely to have affected the outcome of the trial. *Carines, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette